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No. 952

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JOHN P. SPOMAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on December 30, 1964.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, affirming the conviction of petitioner, was rendered on December 30, 1964. That opinion is reported at 339 F.2d 941 and is reprinted in Appendix "A" hereto, p. App. 1, *infra*. The United States District Court for the Northern District of Illinois, Eastern Division, rendered an oral opinion denying petitioner's motion to suppress evidence. That opinion is unreported, but is printed as Appendix "B" hereto, p. App. 6, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1964. A timely petition for rehearing was denied on January 20, 1965. On February 18, 1965, Mr. Justice Clark signed an order extending the time for filing this petition to and including March 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether an alleged waiver of the constitutional guarantees against unreasonable searches and seizures and against self-incrimination is effective, despite the fact that these rights were relinquished by a person being investigated on a criminal charge while he believed that he had no such rights and that he was required to make the incriminating disclosures?

2. Whether the failure of Government agents to advise a suspect that they are investigating a crime allegedly committed by him and that his incriminating disclosures may be used against him requires evidence so obtained to be suppressed if, as a matter of proved fact, the suspect was unaware of the nature of their investigation and of his right to withhold incriminating documents and information?

STATEMENT OF THE CASE

Petitioner was charged by indictment (A. 3-5)[1] with attempted evasion of income taxes due from him and his wife for the calendar years 1958, 1959 and 1960. Petitioner pleaded "not guilty" to the charges and he filed a motion to suppress certain evidence, supported by petitioner's affidavit (A. 6-9). The Government answered (A. 9-11), and the District Court heard evidence on the motion.

Internal Revenue Special Agent George A. Lorenz testified as an adverse witness called by petitioner (A. 11-30). He testified that, on May 31, 1961, he had gone to petitioner's dry cleaning shop accompanied by Ralph Scheidt, another special agent, to make a criminal investigation (A. 13-14). Lorenz introduced himself as a special agent of the Intelligence Division of the Internal Revenue Service and he introduced Scheidt as "Agent Scheidt". Both Lorenz and Scheidt exhibited their pocket commissions (A. 15). Lorenz told petitioner he wanted to speak with him about his income tax, and the parties went back to petitioner's private office (A. 15).

Lorenz showed defendant his 1958 and 1959 returns. Petitioner said that they bore his signature (A. 16). Lorenz then questioned petitioner extensively about financial matters pertinent to the tax returns (A. 19-20). He did not tell petitioner that anything he said could be used against him nor that he had any constitutional right to refrain from conversation with the agents (A. 16). Neither did Lorenz advise petitioner that he had the right to consult

[1] The designation "A." refers to the Appendix filed in the Court below, which has been certified and filed with this Petition.

an attorney or other advisor, but, after he had been there about one half-hour, he asked petitioner for his records (A. 17). Petitioner furnished some records and he told the agents where they could find other records, all of which they examined for most of that day (A. 22). Scheidt's testimony was, in general, corrobative of Lorenz's (A. 31-39).

Petitioner testified that, on the day in question, Lorenz introduced himself as "Mr. Lorenz" and that Lorenz and Scheidt showed him cards (A. 44). When they went back to petitioner's office, Lorenz asked him whether he had any credit coming from his tax returns. Petitioner replied that the only possibility would be the medical end of the return (A. 45). Lorenz then asked to examine his records. Petitioner asked him if he had to see them then. Lorenz said, "Yes, I want to see them now" (A. 45). Petitioner then furnished the records. At no time did Lorenz tell petitioner that he was making a criminal investigation or advise him of his constitutional rights. Petitioner did not then know that he had the right to refrain from answering questions or giving records to the agents (A. 45). He first learned of his rights in that respect when he contacted a lawyer, who referred him to an accountant, Robert J. Roche (A. 45-46). Roche advised him that he had constitutional rights and that he did not have to turn over his records; this was the first time petitioner learned of those rights. The Court sustained objection to the question, "Now, if you had been aware that you had a right to refuse to turn those records over to the agents and answer their questions, would you have turned them over?" (A. 46).

Petitioner offered to prove through Roche, a certified public accountant, that on June 9, 1961, nine days after the interview with Lorenz, Roche had conferred with petitioner; that petitioner had stated he was unaware of his

constitutional rights, saying, "I didn't realize that you could do that, that once they came in as Government Agents I thought we had to give them the records;" and that Roche had advised him of his rights (A. 51-54). Objection was sustained to this proof on the ground that petitioner's state of mind was not in issue (A.52). An offer of similar testimony by Robert Roche's brother, Edward Roche, was also overruled (A. 53-54).

On the basis of the foregoing testimony, the Court denied defendant's motion to suppress. Its oral opinion is attached hereto as Appendix "B".

Subsequently, the cause was tried to the court without a jury on the basis of stipulations and oral testimony. The evidence established the elements of the offense charged, but both the testimony and stipulations were received over petitioner's objection that the evidence obtained from him should have been suppressed.

On the trial of the cause, it was established that all of the income not reported represented payments for cleaning services by Avalon Laundry (A. 72). Lorenz established the discrepancy by comparing a list he had obtained from petitioner on May 31 with records of Avalon (A. 70-71). On June 6, before petitioner had consulted Roche, Lorenz confronted petitioner with the discrepancy. Petitioner then admitted the understatement and he furnished Lorenz with the correct amounts received from Avalon (A. 73-74).

The District Court found petitioner guilty on all three counts of the indictment and sentenced him to serve two years on probation, the first sixty days to be in a local penal institution, and a fine aggregating $5,000 (A. 79-80). On appeal to the Court of Appeals for the Seventh Circuit, this judgment was affirmed on December 30, 1964, and petitioner's timely petition for rehearing was denied on January 20, 1965.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with applicable decisions of this Court and of other courts of appeals which hold that a person relinquishing personal rights guaranteed by the Federal Constitution, in ignorance that such rights exist, has not voluntarily waived them. The decision also approves a standard of conduct in the enforcement of the Federal criminal law, not heretofore reviewed by this Court, which tends to impair the constitutional privileges respecting seizures and self-incrimination.

The Court below was presented with the question whether a suspect ignorant of his constitutional rights had waived them. It responded to that question by asserting the rule that Federal agents are not obliged to disclose to a suspect the nature of their investigation or to warn him of the consequences of his voluntary disclosure of incriminating information. That rule has been stated in several decisions of the courts of appeals, but it has not been decided by this Court. See *e.g.*, *United States* v. *Achilli* (7 Cir., 1956), 234 F. 2d 797, aff'd. 353 U.S. 373[2]; *Grant* v. *United States* (2 Cir., 1961), 291 F. 2d 227, vacated on procedural grounds 369 U.S. 401.

We contended in the Court below and we still contend that this question cannot be considered separately from the fact of petitioner's ignorance of his rights. It would seem clear that a person fully informed of his rights may voluntarily waive them, notwithstanding that he may have obtained his knowledge from a source other than the Government. Hence, the question presented in this case is a narrow one: if, as a matter of fact, the suspect is ignorant of the nature of the agents' inquiry and of his

[2] The grant of certiorari in *Achilli* limited the scope of review to an issue not related to the one here pertinent.

right to remain silent, and if the investigating agents fail to make full disclosure to him, should the evidence so obtained be suppressed? It is not essential to this issue whether Government agents have no absolute duty to give warning, as the Court below thought; what is essential is whether, in failing to give warning, they run the risk that the disclosures obtained may not be admissible because of the suspect's proved ignorance.

The decision below necessarily holds that a taxpayer, being investigated for a felony under the Internal Revenue Code, voluntarily waived his rights with respect to unreasonable seizures and to self-incrimination where he permitted Government agents to seize his personal papers and to obtain incriminating oral statements while he was totally ignorant of his constitutional right to refuse to do so. This decision cannot be reconciled with the principle that waiver implies knowledge of the right waived and that ignorance vitiates any asserted waiver.

The uncontradicted evidence is that petitioner was totally ignorant of the fact that he had the rights supposedly waived. Nothing in the record supports the contrary inference, and neither of the courts below found to the contrary. Indeed, the law is clear that the burden was on the Government to prove knowledge, yet the prosecution offered no evidence on this issue. *United States* v. *Arrington* (7 Cir., 1954), 215 F. 2d 630, 633. By holding that petitioner waived them, the Court below has in effect determined that those most in need of the protection of the constitutional privileges—the ignorant and unsophisticated—are least likely to succeed in invoking them. Such a conclusion surely cannot be valid.

This Court has held that ". . . waiver is ordinarily an intentional relinquishment or abandonment of a known

right or privilege" and that every reasonable presumption will be indulged against waiver of fundamental constitutional rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). That case involved the right to counsel. The courts of appeals have held that a defendant's ignorance vitiates asserted waivers of other great rights: freedom from unreasonable searches and seizures (*Nelson* v. *United States*, D.C. Cir., 1953, 208 F. 2d 505, cert. den. 346 U.S. 827); privilege against self-incrimination (*Wood* v. *United States*, D.C. Cir., 1942, 128 F. 2d 265, 276-278); right to be present at trial (*Evans* v. *United States*, 6 Cir., 1960, 284 F. 2d 393, 395).

The decision below is also clearly inconsistent with the principles announced in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). That case holds that a suspect under interrogation, prior to formal proceedings against him, had the right to obtain professional advice concerning his privilege to remain silent. That holding necessarily implies the principle that an ignorant waiver of the privilege is no waiver at all. The Opinion of this Court expresses that concept in these words:

> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights." 378 U.S. 490.

The rationale adopted by the Court of Appeals has substantial importance in the enforcement of all criminal statutes, but it has particular significance with respect to the revenue laws. Citizens, especially those engaged in

business, are conditioned to inquiries by revenue agents, whose purpose is to determine whether additional tax is due and with whom they readily cooperate. But rarely would a citizen realize that the sole concern of "special" agents is to investigate alleged criminal violations. The fine distinction between "revenue" and "special" agents is not so widely known that the warning inherent in the appearance of police or F.B.I. agents is present. This circumstance makes deception inherent in the conduct of a "special" agent who undertakes to interrogate a taxpayer without some explanation as to the nature of his inquiry. Experience demonstrates that the unwary taxpayer will make the incriminating disclosures, thus, for all practical purposes, becoming the principal witness against himself.

We submit that this case presents a serious question whether such conduct by the Government is a denial of due process and whether it calls for the exercise of the supervisory authority of this Court. Moreover, the present case is a particularly appropriate vehicle for the resolution of this important question. Petitioner not only failed to understand that he had been singled out as a criminal suspect, but he was also ignorant of his fundamental rights. The agents fostered this two-headed misunderstanding by informing him of no more than the fact that they were "special" agents. Their demands for petitioner's cooperation, accompanied by the presentation of their official credentials, persuaded him that he could not properly refuse to comply. Cf. *Johnson* v. *United States* (1948), 333 U.S. 10, 13; *Newman* v. *United States* (5 Cir., 1960), 277 F.2d 794, 797. Moreover, the failure to give warning under the circumstances of this case is even more prejudicial than the corresponding failure of a court to warn a defendant of his rights because, in the latter case, the formal nature

of the proceedings has at least put defendant on notice that he is charged with a crime.

The rule adhered to below tends to erode the constitutional guarantees. Specifically, it encourages the Government to use devious methods; it saddles the unsophisticated taxpayer with a disadvantage not imposed upon others; it limits rights of a fundamental nature; and it is manifestly important in the day-to-day administration of the laws. We respectfully submit that this Court should consider it on the merits.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM AND SESSION, 1964

No. 14644
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN P. SPOMAR,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DECEMBER 30, 1964

Before HASTINGS, *Chief Judge,* and DUFFY and CASTLE, *Circuit Judges.*

HASTINGS, *Chief Judge.* Defendant John P. Spomar is appealing from a judgment of conviction by the district court entered upon a three-count indictment returned November 27, 1962 charging him with "willfully and knowingly attempt[ing] to evade and defeat a large part of the income tax due and owing by him and his wife" for the calendar years 1958, 1959 and 1960, in violation of Title 26, U.S.C.A. §7201.

Defendant waived trial by jury and trial was to the court. He was found guilty as charged and received a two-year suspended sentence. He was placed on probation for two years, the first sixty days of which were ordered to be served in a local penal institution. He was fined $5000 and costs on Count I.

The dispositive issue on this appeal is whether defendant's constitutional rights guaranteed by the Fourth and Fifth Amendments to the Federal Constitution were violated by the district court's denial of defendant's motion to suppress evidence, voluntarily supplied to investigating officers by defendant, on the ground that defendant was unaware of his constitutional right to withhold such evidence.

Defendant operated a retail and wholesale cleaning business as a sole proprietorship in Chicago, Illinois. On May 31, 1961, two agents of the Internal Revenue Service entered defendant's shop, identified themselves as agents of the Internal Revenue Service and told defendant they wanted to talk with him about his income tax. They showed defendant his 1958 and 1959 returns and asked to see his records. Defendant voluntarily produced the records and they were examined by the agents from about 10:30 a.m. until 3:30 or 4:00 p.m., with time out for lunch.

The agents did not inform defendant he had a constitutional right to refuse to answer questions and produce records. Defendant does not contend, on appeal, that his consent to examine the records was obtained by misrepresentation, fraud, deceit, or misconduct on the part of the agents.

Revenue Agents, during the course of an investigation, have no duty to apprise a taxpayer that he need not

furnish requested information and that if he does furnish such information it may be used against him in criminal proceedings. *E.g., Greene* v. *United States,* 2 Cir., 296 F. 2d 841, 842-843 (1961); *United States* v. *Burdick,* 3 Cir., 214 F. 2d 768, 773-774 (1954), remanded, 348 U.S. 905, affirmed on remand, 221 F. 2d 932, cert. denied, 350 U.S. 831. See *United States* v. *Achilli,* 7 Cir., 234 F. 2d 797, 805-806 (1956), affirmed, 353 U.S. 373. Defendant does not contend the agents had a duty to advise him of his right to refuse to furnish the requested information.

Defendant's argument is that he had no knowledge of his constitutional right to refuse to furnish information and therefore such information, although concededly given voluntarily to Internal Revenue Agents, could not be introduced into evidence in the trial against him. Defendant contends that the mere lack of knowledge of his constitutional rights is enough to vitiate the voluntary surrender of his records.

Defendant cites several cases to support this argument. He states, "The leading case is *Johnson* v. *Zerbst,* 304 U.S. 458, in which the court said at p. 465: 'The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.'"

Johnson and other cases cited by defendant are not authority governing the instant case. In these cases, the defendants either had been accused of crime or had not voluntarily consented to the search which produced evidence at a time their constitutional rights were alleged to have been violated by acts or omissions of government

agents or officials. In the case at bar, defendant was merely under investigation when the claimed violations occurred.[1]

"The important relevant inquiry in this case is whether appellant [taxpayer] freely gave his consent to have his records examined with the knowledge that his returns were being investigated." *United States* v. *Wheeler*, 3 Cir., 275 F. 2d 94, 97 (1960), cert. denied, 363 U.S. 828.

In sum, we find in this case the Revenue Agents made known to defendant they were investigating his income tax returns and asked to see his records. With this knowledge, defendant voluntarily produced his records for examination by the agents. There was no misrepresentation, fraud, deceit or misconduct on the part of the agents to gain defendant's consent to such examination. At that time, defendant had not been charged with a crime. This examination of defendant's records subsequently formed the basis of the present criminal charges against him.

Under these circumstances, even though defendant may not have been aware of his constitutional rights above referred to, we hold that his subjective lack of knowledge of such rights did not serve to vitiate the voluntary sur-

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[1] *E.g.* In *Johnson* v. *Zerbst, supra,* at 465, the Court stated, "The Constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Evans* v. *United States*, 6 Cir., 284 F. 2d 393 (1960), held it to be error for the trial judge to instruct the jury in the absence of defendant. In *Wood* v. *United States*, D.C. Cir., 128 F. 2d 265, 276-277 (1942) the court stated that even if defendant had knowledge of his rights, the court must advise him of his constitutional rights before accepting a plea of guilty.

render of his records and did not thereby result in a violation of his right to remain silent and to withhold his private records. The trial court did not err in admitting in evidence the documents and information sought to be suppressed. See *Grant* v. *United States*, 2 Cir., 291 F. 2d 227 (1961).

To hold otherwise would bind the Government by defendant's subjective state of mind which is not subject of proof. It would also stand for the untenable proposition that one who has no duty to advise a taxpayer of his constitutional rights may nevertheless be held responsible for taxpayer's ignorance of such rights. Defendant concedes that no case has gone this far. We do not believe such a holding to be within the purview of the Fourth and Fifth Amendments.

Defendant asserts the district court erred in excluding the testimony of two of defendant's accountants who would have testified that defendant told them nine days after the records were turned over to the agents that he had been unaware of his constitutional rights. This testimony would not have been relevant and there was no error in excluding it.

The judgment appealed from is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Opinion of the District Court denying petitioner's Motion to Suppress Evidence (A. 55-57):

Transcript of proceedings, February 20, 1963.

The Court: This matter comes up after a hearing on the defendant's motion to suppress. The motion was filed under Rule 41(e) of the Federal Rules of Criminal Procedure for the return of seized property and the suppression of evidence. Attached to the motion was defendants affidavit in which he states that on May 31st, 1961, Agent George Lorenz and another agent visited his place of business, and after identifying themselves as Agents of the Internal Revenue Service, they falsely and fraudulently misled the defendant by their conversation and demeanor, causing him to surrender certain specified records which they examined and copied while on the premises during the period of several hours.

Attached to the Government's answer to the motion was the affidavit of Special Agent George A. Lorenz. He stated that he and the agent accompanying him both identified themselves to the defendant, that neither of them misled or deceived him. The nature of the alleged deception practiced on defendant was not in any way specified in the motion. However, because defendant's affidavit was controverted by that of Lorenz, and a fact issue was thereby created, the Court ordered a hearing.

At the hearing, it was admitted by the defendant that the two agents properly identified themselves. As to the nature of the alleged deception, the defendant testified as follows:

> "Q. You make an allegation in your affidavit that by their conversation and demeanor, the agents false-

ly and fraudulently misled you and deceived you?

"A. Yes, I believe that they did at this time.

"Q. In what respect, sir?

"A. I didn't know my Constitutional rights at the time.

"Q. Is that your sole basis?

"A. Yes, I would say that that is my sole basis."

After a careful consideration of the evidence adduced at the hearing and the memoranda filed by the parties, the Court is of the opinion that the facts of this case clearly bring it within the holding of *United States* v. *Achilli*, 234 F. 2d, Seventh Circuit, which involved a similar factual situation. There the Court approvingly quoted the following at page 805:

> "The evidence is silent as to whether Agent Forbes began the investigation as a routine examination to ascertain the civil liability of the defendants or intended from the beginning to search for evidence of crime. But even if the latter assumption be made, there was no violation of the taxpayer's Constitutional rights. The relevant inquiry is always whether the taxpayer freely gives his consent, and as to that there is no dispute in this instance."

Since the uncontroverted evidence shows that there was no affirmative misrepresentation, fraud, deceit, or scheme to defraud practiced by these agents as alleged in defendant's affidavit, and since there was no affirmative duty on the part of the agents to inform him of his rights, the Court concludes that defendant's voluntary surrender of his records was not vitiated in any way, and that his consent to examine and copy them was freely given.

The motion for the return of the seized property and the suppression of evidence is therefore denied. That will be the order of the Court.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 952

JOHN P. SPOMAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by the United States District Court for the Northern District of Illinois (a jury having been waived), petitioner was convicted under Section 7201 of the Internal Revenue Code of 1954 for wilfully attempting to evade his taxes for the years 1958, 1959 and 1960. He was fined $5,000, and sentenced to two years in prison, the prison sentence to be suspended after service of 60 days. The Court of Appeals affirmed (339 F. 2d 941; Pet. App. 1-5).

Petitioner seeks certiorari on the ground that his constitutional rights were violated by the district court's denial of his pre-trial motion to suppress certain evidence obtained from him by special agents of the Internal Revenue Service.

The agents in question went to petitioner's place of business, identified themselves, made known that they were investigating his income taxes and asked if he would produce his records (Pet. App. 4). As the court of appeals noted (*ibid.*), there was no deceit or misrepresentation and petitioner voluntarily complied with the request. The claim is made that the information gained should nonetheless have been suppressed because the agents did not advise petitioner of his Fifth Amendment privilege and of his right to consult with counsel. However, in circumstances of the kind disclosed here, the law requires only that the information or access be freely given. *Wilson* v. *United States*, 162 U.S. 613, 621-624; *Powers* v. *United States*, 223 U.S. 303, 312-314; *Scanlon* v. *United States*, 223 F. 2d 382, 385 (C.A. 1); *Greene* v. *United States*, 296 F. 2d 841, 843 (C.A. 2), vacated and remanded on other grounds, 369 U.S. 403; *United States* v. *Sclafani*, 265 F. 2d 408, 414-415 (C.A. 2), certiorari denied, 360 U.S. 918; *United States* v. *Burdick*, 214 F. 2d 768 (C.A. 3), vacated and remanded, 348 U.S. 905, affirmed on remand, 221 F. 2d 932, certiorari denied, 350 U.S. 831; *Turner* v. *United States*, 222 F. 2d 926, 931-932 (C.A. 4), certiorari denied, 350 U.S. 831; *Montgomery* v. *United States*, 203 F. 2d 887, 893 (C.A. 5); *United States* v. *Achilli*, 234 F. 2d 797, 805 (C.A. 7), affirmed on other issues,

353 U.S. 373; *Hanson* v. *United States*, 186 F. 2d 61, 64-66 (C.A. 8).

Contrary to petitioner's suggestion, *Escobedo* v. *Illinois*, 378 U.S. 478, has no application. In *Escobedo*, the Court, while holding that the Sixth Amendment was violated by the refusal of the police to honor the defendant's request to consult with his lawyer during the course of an interrogation, carefully limited its holding to the particular facts of the case, as follows (pp. 490-491):

> "* * * where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment * * *"

Here, the petitioner was not taken into custody; he was not interrogated in the unfamiliar and threatening surroundings of a police station; he was not denied the opportunity to consult with friends or counsel.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

MARCH, 1965.

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Respondent.

Petition for Rehearing

Petitioner, John P. Spomar, respectfully prays that this Court grant rehearing of its order of April 26, 1965, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled cause, as prayed in the petition filed herein on March 4, 1965.

REASON FOR GRANTING REHEARING AND ISSUING THE WRIT

The decision of the court below interprets and applies *Escobedo* v. *Illinois*, 378 U.S. 478, in a manner conflicting with the interpretations by courts of last resort in certain of the States.

After the petition for certiorari was filed in this cause, petitioner's attorneys became aware that the courts of last resort in at least three states, California, Oregon and Rhode Island, have rendered decisions holding that, under *Escobedo* v. *Illinois*, 378 U.S. 478, confessions obtained from suspects who had been singled out in the investigation of a crime were inadmissible because the officers had failed to warn the suspects of their right to remain silent or to have the advice of counsel. Inasmuch as the court below held that there is no such duty to give warning, it is clear that a sharp disagreement has arisen among the courts as to the scope and effect of the *Escobedo* decision. That decision involves rights of the most fundamental character, and the existing uncertainty respecting them has created an undesirable situation in the administration of criminal justice.

In *People* v. *Dorado*, 42 Cal. Rptr. 169 (Cal. Sup. Ct., in bank, 1965), defendant, an inmate of San Quentin, was convicted of murdering a fellow prisoner. The trial court found, and the Supreme Court did not disturb the finding, that defendant had voluntarily confessed the crime before any formal proceedings against him had been commenced. Nevertheless, the conviction was reversed on the authority of *Escobedo* and *Massiah* v. *United States*, 377 U.S. 201, because the interrogating officers had not advised defendant

of his right to remain silent or of his right to counsel. The Court said, at 42 Cal. Rptr. 178:

> "Although in the instant case defendant could have waived his right to the assistance of counsel, we can find no waiver here in the absence of evidence that he knew of his right. Thus Escobedo points out that an 'accused may, of course, intelligently and knowingly waive * * * his right to counsel either at a pre-trial stage or at the trial.' (378 U.S. at 490 n. 14, 84 S.Ct. at 1765) That defendant should be informed of such right in order to sustain an alleged waiver finds expression in *Griffith* v. *Rhay* (1960), 9 Cir., 282 F.2d 711: 'Since Griffith had a right to the assistance of counsel on the afternoon of the interrogation, his failure to request such assistance has significance only if it amounted to a waiver of that right. But a waiver is an intentional relinquishment or abandonment of a known right or privilege. A waiver cannot be effected unless it is intelligently and competently given.' (Id. at p. 717.)"

In *State* v. *Neely*, 398 P.2d 482 (Ore. Sup. Ct., *en banc*, 1965), defendant had confessed to the crime of statutory rape while under arrest. The signed confession recited that defendant knew he was not required to make any statement. Nonetheless, the Court held it inadmissible on the ground that defendant had not been advised of his right to counsel. The Court said at 398 P.2d 486:

> "The state upon oral argument contended that a distinction should be made between the necessity of informing an accused of his right to counsel at the judicial stage of a criminal proceeding and prior thereto."

After discussing and quoting from *Escobedo*, the Court further stated (398 P. 2d at 486-487):

> "Adoption of the distinction advanced by the state would lead to results contrary to the basic beliefs of the United States Supreme Court and of this

court. Under the state's contention a suspect like Escobedo who has been previously jailed and, therefore, has previously needed the assistance of counsel, has a constitutional right to counsel because he knows through experience to demand counsel; however, a suspect who has never had any prior experience with the criminal process and, therefore, does not know by experience the assistance that a lawyer can give and, therefore, does not demand such assistance, has no constitutional right to counsel. If the state's distinction were accepted, we would grant the assistance of counsel to those educated enough to demand it and deny it to those too ignorant to ask for it. The United States Constitution demands equal treatment during the criminal process for the inexperienced and the uneducated.

"* * * In the absence of such knowledge an accused can in no way be deemed to have intelligently waived his constitutional rights, and in the absence of such waiver a confession obtained by such interrogation is inadmissible."

It is significant that both the *Dorado* and *Neely* cases were decided by the highest court of the respective states, sitting *en banc*, and that in both cases earlier opinions were withdrawn. See *People* v. *Dorado*, 394 P.2d 952, 40 Cal. Rptr. 264; *State* v. *Neely*, 395 P.2d 557. Unquestionably, therefore, the final opinions of these courts reflect the product of unusually careful consideration of the issues presented.

In *State* v. *Dufour*, 206 A.2d 82, 85 (1965), the Supreme Court of Rhode Island relied upon the *Escobedo* case in holding that a confession of a defendant under an informal arrest was invalid where the officers failed to advise him of his right to remain silent or of his right to counsel. The case is particularly pertinent because the concurring opinion of Justice Joslin is a good statement of the view

that *Escobedo* is not authority beyond its own facts. Thus, in a single decision, there is illustrated the point we make here—that *Escobedo* requires explanation in order that State and Federal courts may intelligently and correctly implement the constitutional guarantees. Only this Court can furnish that explanation, and we respectfully submit that the Court should do so, for until the conflict of views is resolved, many defendants will be denied their rights or, on the other hand, some valid convictions will continue to be set aside.

The instant case is an appropriate vehicle for such clarification. It was proved that petitioner was ignorant of his rights, yet the courts below held that he had waived them while ignorant, and in the absence of even a rudimentary effort by his interrogators to give him advice.

CONCLUSION.

For the reasons set forth above and in the petition for certiorari, it is respectfully urged that a rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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